Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

NATHANIEL S. THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a warrant issued by a magistrate whose decision to issue was affected by information obtained from a prior illegal search is valid, allowing any contraband recovered in the subsequent search to be admissible as evidence.

2. Whether an appellate court may determine from the record whether the issuing magistrate was "substantially affected" by the tainted evidence where the issuing magistrate did not testify at the suppression hearing.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

All parties appear in the caption of the case on the cover page. No party to this petition is a non-governmental corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nathaniel S. Thompson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

On June 15, 2003, the District Judge in the Northern District of Ohio, Eastern Division, granted the Petitioner's Motion to Suppress Evidence that was confiscated from the Petitioner's hotel room in violation of the Fourth Amendment to the United States Constitution. (Appendix 1a) On January 28, 2005, the Federal Court of Appeals for the Sixth Circuit reversed the decision of the District Court. (See Appendix 20a)

JURISDICTION

The judgment and opinion of the court of appeals was entered on January 28, 2005. Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On March 18, 2003, a Federal Grand Jury in Cleveland Ohio, returned a one count indictment charging Nathaniel Thompson and a co-defendant with the violation of Title 21, Sections 841(a)(1) and (b)(1)(A), United States Code.

On May 16, 2003, Petitioner Thompson filed a Motion to Suppress the contraband, in this case cocaine, from his hotel room. The district court in the Northern District of Ohio conducted a hearing on the motion. On June 15, 2003, the district court granted the motion to suppress the contraband obtained from a hotel room paid for by the petitioner.

The government appealed the suppression to the Sixth Circuit Court of Appeals. On January 28, 2005, the Sixth Circuit reversed the suppression of the evidence by the district court. This timely filed Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. WHERE AN ISSUING MAGISTRATE IS AFFECTED IN HIS PROBABLE CAUSE DETERMINATION BY INFORMATION OBTAINED FROM AN ILLEGAL SEARCH, THE RESULTANT WARRANT IS INVALID. ANY CONTRABAND RECOVERED IN THE SUBSEQUENT WARRANT SEARCH MUST BE SUPPRESSED. MURRAY V. UNITED STATES, 487 U.S. 533 (1988).

The Sixth Circuit made an unwarranted deviation from this Court's holding in Murray v. United States, 487 U.S. 533 (1988). In Murray, this Court found that a subsequent search pursuant to a warrant would not be an independent source of

evidence unearthed by a previous search if the information obtained during the first search was "presented to the Magistrate and affected his decision to issue the warrant." Id. at 542.

In the instant case, the magistrate's decision to issue a search warrant was affected by the fruits of a prior illegal search. Here, investigating agents were tipped as to possible illegal activity in relation to the Petitioner's renting of a hotel room. Agents secured the hotel room. However, before a warrant could be obtained, an agent inside the room picked up and squeezed luggage he found piled upon each other against a wall. By picking up and squeezing the luggage, he determined that the bags contained bricks of cocaine. The government conceded that the agent's the picking up and squeezing of bags is an illegal warrantless search for Fourth Amendment purposes.

The agent's information derived from the illegal search were ultimately supplied to the magistrate who ultimately issued the warrant *prior to* the issuance of the warrant. A subsequent search of the bags uncovered numerous bricks of cocaine in the luggage.

It was not disputed that the illegal information affected the decision making process of the issuing magistrate. The Sixth Circuit found that Murray could be distinguished, or rather, that the decision should not be read as requiring *strict* compliance with its holding. The Sixth Circuit conceded that strict compliance would require suppression of the evidence.

> A strict application of *Murray*'s test of whether information from the first search affected the magistrate's decision, without consideration of other authorities and the underpinnings of the *Murray*

> reasoning, might well suggest that the district court's suppression of the cocaine was correct. After all, the information from Riolo's unlawful inspection of the bags in Room 127 (as well as from the confidential informant) was presented to the judge at the time the affidavit was presented, and while it is impossible to know whether the oral information "affected" the judge's decision in some way, one would think it likely. Agent Kahler himself testified that he felt that the information the officers told Judge Corrigan affected his decision.

United States v. Jenkins, et al, 396 F.3d 751, 760 (2005).

Nevertheless, the Sixth Circuit constricted this Court's holding in Murray. The circuit court, citing United States v. Herrold, 962 F.2d 1131, 1141 (3d Cir. 1992), interpreted Murray to mean that, in these situations, for evidence to be inadmissible due to the government's failure to collect it via an independent source, the tainted information presented to the judge must affect the judge's decision in a *substantive*, meaningful way. Under this interpretation of Murray, the simple fact that an application for a warrant contains information obtained from an illegal search does not by itself signify that the independent source doctrine does not apply. Id. If the application for a warrant contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry.

In Murray, this Court found that a police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of

information *wholly unconnected* with the initial entry. Id. 535 (Emphasis added.) Murray cited Nix v. Williams, 467 U.S. 431, 443 (1984), for the principle that:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

The tainted evidence here was not wholly unconnected with the initial entry into the hotel room. Law enforcement officials had secured the hotel room in order to obtain a warrant. The entry into the hotel room was gained through force. The consent to look throughout the room while a warrant was obtained was obtained from a person who did not have standing to provide consent. The consenting person indicated to the officers that neither the hotel room nor the bags were hers. The officers both testified at the suppression hearing that at the time of the officers' entry into hotel room, luggage bags were stacked against the wall, where one could not see inside them). One of the officers proceeded pick up and grab the bag, explaining that his decision to touch the bags before the warrant was issued: "I just felt I should touch them and see what there was inside. If it was soft and it was clothes, or maybe I just wanted to feel them and see how heavy they were and get that information back to Mr. Kahler," the agent preparing the warrant affidavit.

Because the touching of the bags before the warrant issued was unlawful, the question is whether application of the exclusionary rule to the cocaine would put the police in the same, but not a worse, position than they would have been absent any error or misconduct. Nix v. Williams, 467 U.S. 431 (1984). If it would put the police in a worse position, in that the cocaine was nonetheless discovered through sources "wholly independent of any constitutional violation," then the independent source doctrine applies. Murray at 541.

The independent source rule holds that evidence will be admitted if the government shows that it was discovered through sources "wholly independent of any constitutional violation." Nix at 412. In deciding whether the independent source rule allows the admission of evidence that would otherwise be excluded, courts "should keep in mind the underlying question: 'whether, granting establishment of the primary illegality, [the evidence has] been come at by the exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Id. (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

According to Murray, a subsequent search pursuant to a warrant would not be an independent source of evidence unearthed by a previous search if the information obtained during the first search was "presented to the Magistrate and affected his decision to issue the warrant." Id. at 542.

As noted above, the Sixth Circuit found that the information derived from the illegal search did affect the decision of the magistrate in the decision to issue the warrant. Even the agent in question acknowledged that the information affected the magistrate. However, because the four corners of the affidavit submitted to the magistrate in support of the

warrant alone, in the opinion of the Sixth Circuit, sufficiently supported the issuance of the search warrant, the taint, by definition, did not substantially affect the magistrate's issuance.

The affidavit did not establish probable cause in this matter. The affidavit established, at best, an educated guess or hunch that drug activity may be taking place in the room, but lacked any specific findings that made the issuance a certainty. It was a bare bones affidavit which failed to provide sufficient factual information for a finding of probable cause. Giordenello v. United States, 357 U.S. 480 (1958).

Clearly, the officers were worried about the magistrate's decision as they believed it necessary to call fellow officers meeting with the judge to have them inform the judge of the discovery of the cocaine bricks in the luggage.

The Sixth Circuit did not address the above, but rather addressed only whether the four corners of the submitted affidavit would supply the basis for the issuance of the warrant.

> Indeed, the affidavit for Room 127 contains a particularized account of facts and circumstances that amount to a "fair probability" that evidence could be found in the room, including: the payment of cash, the suspicious driving pattern of the Suburban, the criminal history of the renter of the room and the owner of the Suburban, the police canine's positive indication for narcotics in the Suburban, and the marijuana found on Jenkins. Taken by itself, and considering the totality of the circumstances, the

> affidavit provides sufficient probable cause for the warrant.

United States v. Jenkins, et al, 396 F.3d 751, 760 (2005).

This ignores what actually transpired in this case. The affiant for the search warrant, who was actually present with the magistrate when the warrant was issued, testified as follows:

> The judge read over our affidavit, read over the warrant and we discussed our probable cause section. We gave him the other information that we contemplated putting in there . . . ***Based upon that***, he felt there was probable cause.

(Emphasis added)

The independent source doctrine does not apply here as the government may not show that the evidence was discovered wholly independent of any constitutional violation. Even under a substantial affected test, the magistrate here relied, minimally in part, on the tainted evidence to issue the search warrant for the hotel room of the Petioner Thompson. Therefore, under either test, the evidence may not by utilized by the government.

II. IF MURRAY V. UNITED STATES ALLOWS THE ISSUANCE OF A SEARCH WARRANT WHERE AN INDEPENDENT SOURCE EXISTS AND THE ISSUING MAGISTRATE IS NOT "SUBSTANTIALLY AFFECTED" BY THE TAINTED EVIDENCE, MUST THE REVIEWING COURT REMAND THE CASE TO THE DISTRICT COURT FOR SUCH DETERMINATION WHERE THE RECORD DOES NOT ESTABLISH WHETHER THE MAGISTRATE WAS "SUBSTANTIALLY AFFECTED" IN THE DECISION TO ISSUE THE WARRANT.

If this Murray does allow for the "substantively affected" test, that is, whether the tainted evidence substantially affected the magistrate's decision to issue the search warrant, it is the district court rather than the appellate court that must make this determination. This is particularly true where the suppression hearing held in the district court failed to build a sufficient record for any court, let alone the circuit court, to make this determination.

Here, the Sixth Circuit did not attempt to determine the extent that the magistrate's finding of probable cause to issue the search warrant was affected by the tainted evidence. Instead, the court of appeals ignored the taint and made its own determination as to whether the magistrate would have issued the warrant on the law enforcement affidavit alone. Jenkins, et al, at 760.

In the Petitioner's case, while officers were meeting with the magistrate to obtain an affidavit, the magistrate was informed of the probable cause evidence within the affidavit as well as probable cause not in the affidavit. In other words,

the officers orally informed the judge about the brick-shaped packages in the bag, as well as about the manner in which the Petitioner and his co-defendant Jenkins checked into the hotel, even though this information was not in the affidavit. The judge was informed that officers had secured the hotel room while awaiting his decision.

When asked at trial whether he thought the oral information affected the judge's decision to issue the warrant, the agent with the judge at the time of the issuance of the warrant stated:

> A: Well, to the best of my ability, I felt the warrant stood on its own. Did it affect his decision? I felt going through the probable cause of what we had in the warrant affected his decision.
>
> Q: Including the fact that you told him orally that there were brick-shaped objects?
>
> A: Yes, but I first went over what's in the warrant and then I went over here's what's not in the warrant....If I thought it affected his decision as much as occurred in the past, he would have instructed me to add a paragraph.

The ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. The issue here is whether under a "substantially affected" test, the magistrate would have issued the warrant without the tainted information. It is not whether the Sixth Circuit believed that the affidavit, in its opinion, could have supplied a basis for a probable cause finding.

This Court in Murray faced a similar situation. The court of appeals wrote that they could be "absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant." This Court found that although these statements could be read to provide emphatic support for the government's position,

> . . . it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings. The District Court found that the agents did not reveal their warrantless entry to the Magistrate, App. to Pet. for Cert. 43a, and that they did not include in their application for a warrant any recitation of their observations in the warehouse, *id.*, at 44a-45a. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse. The Government concedes this in its brief. Brief for United States 17, n. 5. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," App. to Pet. for Cert. 42a, and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Id. 543.

Therefore, this Court remanded the case for a hearing to determine additional facts. Id. at 543-44. Similarly, if the

"substantially affected" test is allowed, this matter must be remanded to determine the extent that the issuing magistrate relied upon the tainted evidence to issue the search warrant.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the petition for writ of certiorari be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-3989

[Filed January 28, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellant,	)
v.	)
ANDRE JENKINS; NATHANIEL S. THOMPSON, Defendants-Appellees.	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 03-00112
Lesley Brooks Wells, District Judge

Before: MARTIN, COLE, and GIBBONS, Circuit Judges.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Defendants-appellees Andre Jenkins and Nathaniel Thompson, charged with possession with intent to distribute cocaine, moved to

suppress evidence obtained during two searches. The district court granted the defendants-appellees' motions, and the government appeals. The government argues that the district court erred in suppressing the evidence, as the evidence is admissible under the independent source doctrine, under the good faith exception to the warrant requirement, or because it was obtained through a search based on a valid warrant. For the reasons set forth below, we reverse the district court's ruling suppressing the evidence obtained from both searches and remand the case for trial on the merits.

I.

At 10:28 p.m. on February 13, 2003, Andre Jenkins and Nathaniel Thompson entered the Holiday Inn in Beachwood, Ohio. In the course of renting a room, Thompson offered his identification to the front office manager, Robert Jeffries, who made a photocopy of the ID and noted that it identified Thompson as a local resident.[1] After paying cash to rent Room 127 for two nights, the two men unloaded what appeared to the office manager to be very heavy bags from their Ford Explorer onto a luggage cart, which they then took to the room. Jeffries found these circumstances to be suspicious, so he contacted John Kornek, a Beachwood police officer and member of the Ohio High Intensity Drug Trafficking Area (HIDTA) Task Force, and reported the activities of the two men as well as the license plate number of the Explorer. Members of the HIDTA Task Force had asked Jeffries to report any suspicious behavior among guests at the hotel, and Jeffries had done so numerous other times over the previous year and a half.

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[1] Neither Jeffries nor any law enforcement personnel knew that the other man was Andre Jenkins until he was arrested the next day.

Officer Kornek immediately called Officer Kevin Grisafo, another policeman and member of the HIDTA Task Force, and suggested that he go to the Holiday Inn to follow up on Jeffries's report. Officer Grisafo noted that Room 127 had a do-not-disturb sign on the door, and he ran checks on Thompson and the Explorer. Thompson had been arrested twice for drug-related offenses and had a conviction for carrying a concealed weapon. The Explorer was registered to Bonnie Jones at 11906 Imperial, in Cleveland, who herself had a criminal record (including drug-related offenses).[2] Officer Grisafo acquired the room across the hall from Room 127 for surveillance purposes, and he contacted IRS Agent Mark Kahler, who sent three HIDTA Task Force agents to staff the surveillance room. Officer Grisafo parked across the street from the hotel. At approximately 4:25 a.m., he saw a Suburban pull into the hotel parking lot, circle through the lot, exit the lot, and then reenter the lot, dropping off a woman at the lobby. The Suburban again exited the lot and parked across the street at another hotel, even though there was ample parking at the Holiday Inn. The driver walked quickly back to the Holiday Inn and entered through a locked hotel entrance, using a room key. He met the woman he had dropped off in the lobby, and together they entered Room 127. Officer Grisafo ran a check on the Suburban, tracing it to Lacell Torrence, who himself had a number of arrests on his record.[3] At about 8:30 a.m. on February 14, a police dog

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[2] Jones testified that she has never been arrested or convicted, explaining that her criminal record nonetheless includes several offenses because her sister used her name in committing those crimes.

[3] Officer Grisafo testified that Mr. Torrence had a "long history of drug offenses," but his record included only a series of arrests, not convictions, and only one was drug-related.

gave a positive indication for the presence of narcotics in the Suburban. Around noon that day, the driver of the Suburban walked out of the room and left the hotel carrying several towels. FBI Agent Kenneth Riolo approached the individual, who identified himself as Andre Jenkins and stated that he had been applying for a job "across the street." Mr. Jenkins denied that he had been in the Holiday Inn with a female, denied that he had any contraband on him, and gave permission for Agent Riolo to search the car. Agent Riolo and other officers searched Mr. Jenkins, who had a small bag of marijuana, $1500 in cash, two cell phones, and a pager on his person. The officers did not search the car. Agent Riolo believed the woman in the room might have seen the search of Mr. Jenkins through the window, so he advised other HIDTA Task Force officers on the scene to secure Room 127 to prevent the destruction of evidence and to further "officer safety."

Throughout the morning and during this time, Officer Grisafo had been passing on information to IRS Agent Mark Kahler at the HIDTA Task Force office so that Kahler could prepare an affidavit for a search warrant covering the Suburban and Room 127. Meanwhile, after Jenkins was searched, officers entered Room 127, although witness accounts of their entry differ. Officers Grisafo and Kornek testified that they, along with another officer, knocked on the door, and the woman, who identified herself a few minutes later as Joyce Bell, let them in after being informed the police were in the process of getting a search warrant and wanted to secure the room. Bell, however, testified that a female housekeeper, who she saw through the door's peephole, knocked on the door instead of the officers. Bell stated that she cracked open the door to retrieve towels from the housekeeper, but the officers then "busted in the room,"

knocking her onto the floor of the closet with the door. She also testified that a gun was pointed at her.

Regardless, all witnesses agreed that Bell was only partially clothed, and Officer Kornek took her to a chair in the back of the room so that she could get dressed. He checked the chair and her clothes for weapons and asked if she would consent to a search of the room, including three bags of luggage stacked against the wall and an apparently empty bag lying beside them. Bell agreed, indicating that neither the hotel room nor the bags were hers. Bell and Kornek both testified that at the time of the officers' entry into Room 127, the bags were stacked against the wall (where one could not see inside them), and neither Bell nor Kornek touched the bags or saw any of the other officers touch them. Nevertheless, when Officer Grisafo, who had remained by the doorway inside the room while Bell gave consent to search the room, entered the room, he saw one of the bags on the bed, "wide open," "unzipped enough where it was pulling apart," with "brick-type items in there wrapped in cellophane." Officer Kornek agreed that at some point one of the bags was moved to the bed, where it lay partially open, but he did not know how the bag was moved.

The only witness to testify that he touched the bags was Agent Riolo, who entered the room about five minutes after the officers' initial entry. After being told that Bell consented to a search of the room and its contents, and noting that the

room key sat on the counter between the beds, he announced that the officers should wait for a warrant to search the room.[4] Riolo also testified that when he entered the room, at least one of the bags lay on the bed, with the zipper partially open, exposing some orange brick-shaped items. Riolo proceeded to pick up all of the bags and feel them, noting that they were full (of "bricks") and very heavy. On cross-examination he explained his decision to touch the bags before the warrant was issued: "I just felt I should touch them and see what there was inside. If it was soft and it was clothes, or maybe I just wanted to feel them and see how heavy they were and get that information back to Mr. Kahler," the agent preparing the warrant affidavit.

When Agent Riolo entered the room, Officer Grisafo left to meet Agent Kahler at the HIDTA Task Force office to review the affidavit (which Kahler had evidently completed) for accuracy. Before Grisafo arrived, Kahler was informed that there were bricks in the bags,[5] but Kahler decided to exclude this information and the information provided by the confidential informant (Jeffries) from the affidavit, both to protect the identity of the source and because the affidavit was "more than sufficient" without that information. On the way to the Cuyahoga County courthouse to have a magistrate sign the warrant, Kahler conferred by phone with an Assistant County Prosecutor, who advised him to make sure that the

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[4] At about this time, Bell was taken from the room to the Beachwood jail. She testified that before she left, she saw the officers opening drawers and looking behind curtains but did not observe them take any other actions inside the room.

[5] Although it is unclear from the record, it appears that Riolo called Kahler after Riolo felt the bags to let Kahler know of the bricks inside.

judge was aware that the officers had already secured Room 127. When Kahler and Grisafo met with Judge Brian Corrigan, Kahler "informed him of the probable cause within the warrant as well as probable cause not in the warrant." In other words, Kahler and Grisafo orally informed the judge about the brick-shaped packages in the open bag on the bed, as well as about the manner in which Jenkins and Thompson checked into the hotel, even though this information was not in the affidavit. Kahler also told the judge that officers had secured Room 127. When asked at trial whether he thought the oral information affected the judge's decision to issue the warrant, Agent Kahler stated:

> A: Well, to the best of my ability, I felt the warrant stood on its own. Did it affect his decision? I felt going through the probable cause of what we had in the warrant affected his decision.
> Q: Including the fact that you told him orally that there were brick-shaped objects?
> A: Yes, but I first went over what's in the warrant and then I went over here's what's not in the warrant....[I]f I thought it affected his decision as much as occurred in the past, he would have instructed me to add a paragraph.

At about 1:30 p.m., the judge "swore [Officer Grisafo] to the information that had been provided and signed the warrants."[6] Officer Grisafo immediately called Riolo to let him know the warrant had been signed. While Grisafo and Kahler were still in the judge's chambers, Riolo searched the bags and

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[6] Officer Grisafo testified that the judge had him "swear to everything I told him orally and what was written out."

informed Grisafo, Kahler, and the judge that the bags contained roughly seventy kilos of cocaine.[7]

Later in the day on February 14, Cuyahoga County Corrections Officer Eugene Sanchez booked Andre Jenkins at the county jail. Jenkins repeatedly asked Sanchez if he could make a phone call, but Sanchez was under orders to not allow Jenkins to use the phone. Sanchez eventually told Jenkins he would make a call for him, at which point Jenkins wrote a name and number on a piece of paper and told Sanchez three times "to let Bon know to clean up, they are coming." Sanchez immediately passed on this information and the piece of paper to Officer Kornek, who traced the number to a Mr. Jones at 11906 Imperial in Cleveland, the same address to which the Explorer driven by Jenkins and Thompson was traced. Based on this information, the information contained in the affidavit for the warrant for Room 127, and other information gathered by various law enforcement officials that day, Agent Kahler and Officer Randy Wilson prepared an affidavit and search warrant for 11906 Imperial. In the affidavit, Wilson reported the message from Jenkins to Sanchez as "get the shit out as the police [are] coming." Wilson testified at trial that he could not recall whether those were the exact words relayed to him, but he said they were at least very similar to what he was told by another officer. At approximately 10:00 p.m. on February 14, Judge Corrigan signed the warrant for 11906 Imperial; it was executed later that evening. The search of the residence yielded a Rolex watch, two firearms, and $68,000 in cash, among other items.

On March 18, 2003, defendants-appellees Andre Jenkins and Nathaniel Thompson were indicted for possession with

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[7] There were seventy-three kilos of cocaine in the bags.

the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1)–(b)(1)(A) and 18 U.S.C. § 2. On April 17, 2003, defendant-appellee Jenkins moved to suppress the Rolex, firearms, and cash seized during the search of 11906 Imperial. On May 8, 2003, defendant-appellee Jenkins moved to suppress the cocaine seized in Room 127 of the Holiday Inn. On May 16, 2003, defendant-appellee Thompson also moved to suppress the cocaine. The district court granted all three motions to suppress on June 15, 2003. The government appealed from the order of suppression on July 11, 2003.

II.

This court reviews a district court's decision on a motion to suppress under two standards. "Findings of fact are upheld unless clearly erroneous, while conclusions of law are reviewed *de novo*." *United States v. Leake*, 95 F.3d 409, 416 (6th Cir. 1996).

A.

The government first argues that the cocaine is admissible under the independent source doctrine. Application of the independent source doctrine is a mixed question of law and fact that is reviewed *de novo*. *Id.*

The independent source rule holds that evidence will be admitted if the government shows that it was discovered through sources "wholly independent of any constitutional violation." *Id.* at 412 (quoting *Nix v. Williams*, 467 U.S. 431, 443, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)). In deciding whether the independent source rule allows the admission of evidence that would otherwise be excluded, courts "should keep in mind the underlying question: 'whether, granting establishment of the primary illegality, [the evidence has]

been come at by the exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). Since Agent Riolo's touching of the bags before the warrant issued was unlawful,[8] the question is whether application of the exclusionary rule to the cocaine would put the police in the same, but not a worse, position than they would have been absent any error or misconduct. *See Nix*, 467 U.S. at 443. If it would put the police in a worse position, in that the cocaine was nonetheless discovered through sources "wholly independent of any constitutional violation," then the independent source doctrine applies. *Leake*, 95 F.2d at 412; *see Murray v. United States*, 487 U.S. 533, 541, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

According to *Murray*, a subsequent search pursuant to a warrant would not be an independent source of evidence unearthed by a previous search if the information obtained during the first search was "presented to the Magistrate and affected his decision to issue the warrant." *Id.* at 542. In *Murray*, the police illegally searched a warehouse but then prepared a warrant based only on their observations before the illegal search. *Id.* at 535-36. The Court remanded the case for determination of whether the warrant for the second search resulted from information independent of the illegal search. *Id.* at 543-44. A strict application of *Murray*'s test of whether information from the first search affected the

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[8] The picking up and squeezing of bags is a search for Fourth Amendment purposes, *see Bond v. United States*, 529 U.S. 334, 337-39, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000), and the government conceded at oral argument that Agent Riolo's warrantless search was unlawful.

magistrate's decision, without consideration of other authorities and the underpinnings of the *Murray* reasoning, might well suggest that the district court's suppression of the cocaine was correct. After all, the information from Riolo's unlawful inspection of the bags in Room 127 (as well as from the confidential informant) was presented to the judge at the time the affidavit was presented, and while it is impossible to know whether the oral information "affected" the judge's decision in some way, one would think it likely. Agent Kahler himself testified that he felt that the information the officers told Judge Corrigan affected his decision.

All courts of appeals to have considered the matter, however, have interpreted *Murray* to mean that, in these situations, for evidence to be inadmissible due to the government's failure to collect it via an independent source, the tainted information presented to the judge must affect the judge's decision in a *substantive*, meaningful way. *See, e.g., United States v. Herrold*, 962 F.2d 1131, 1141 (3d Cir. 1992). Under this interpretation of *Murray*, the simple fact that an application for a warrant contains information obtained from an illegal search does not by itself signify that the independent source doctrine does not apply. *Id.* If the application for a warrant "contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry." *Id.* at 1141-42. Other circuits have joined the Third Circuit and interpreted *Murray* in the same way, and no circuit has taken a contrary approach. *See, e.g., United States v. Markling*, 7 F.3d 1309, 1315-16 (7th Cir. 1993) (considering whether probable cause remained after purging tainted information from a warrant and noting that "this is the approach federal courts...typically take" in applying *Murray*); *United States v. Restrepo*, 966

F.2d 964, 968-70 (5th Cir. 1992) (interpreting *Murray* to mean that "evidence obtained in an illegal search is first excised from the warrant affidavit, after which the expurgated version is evaluated for probable cause"); *United States v. Halliman*, 287 U.S. App. D.C. 380, 923 F.2d 873, 880-81 (D.C. Cir. 1991) (finding that despite the inclusion of tainted information in a warrant application, "there [were] overwhelming independent grounds for probable cause" in the application); *United States v. Gillenwaters*, 890 F.2d 679, 681-82 (4th Cir. 1989) (setting aside facts illegally obtained from the rest of the information in an affidavit and then examining the affidavit for probable cause); *United States v. Veillette*, 778 F.2d 899, 903-04 (1st Cir. 1985) (same).

The rationale for explicitly linking the *Murray* independent source rule with the approach of considering the sufficiency of the untainted affidavit, as other circuits have done, is sound and consistent with the rationale underlying *Murray*. The idea behind *Murray* and related cases is that police who carry out a search that they should not have carried out should be put in the same, *but no worse*, position than they would have been absent any error or misconduct. *See Murray*, 487 U.S. at 541; *Nix*, 467 U.S. at 443. Invalidating a search warrant because the magistrate was affected in some minor way by tainted information, when the warrant would have been granted even without the tainted information, would put the police in a worse position than they would have been in had they not presented the tainted information to the magistrate. In addressing an analogous situation, the Supreme Court in *Franks v. Delaware*, 438 U.S. 154, 171-72, 172 n.8, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), suggested that false or reckless statements in a warrant should be set aside and that the warrant should then be examined to determine "if what is left is sufficient to sustain probable cause." Since "knowingly including a false

statement in a warrant affidavit seems the functional equivalent of (if not an even more serious transgression than) including in the affidavit knowledge of facts illegally obtained,"*see Veillette*, 778 F.2d at 904, then it makes sense to deal with cases such as the present one in the same fashion utilized by the Supreme Court in *Franks*. *See also United States v. Johnston*, 876 F.2d 589, 594 (7th Cir. 1989) (Posner, J., concurring) (noting that the Supreme Court in *Franks* assumed without holding that "a search warrant procured on the basis of an affidavit that contains unlawfully obtained information is nevertheless valid if the lawfully obtained information in the affidavit is sufficient by itself to establish probable cause for the search" and collecting cases concurring in this rule).

The approach adopted in *Herrold* and other cases of considering the sufficiency of probable cause in a warrant after removing the "taint" has been applied by this court. In *United States v. Shamaeizadeh*, 80 F.3d 1131, 1136 (6th Cir. 1996), we articulated a principle we referred to as "closely resembling the independent source rule" and held that "when a trial court is presented with a redacted affidavit, it must review each portion of that affidavit so that the reviewing court may determine whether the untainted portion of the affidavit . . . sufficiently supported a finding of probable cause." (citation and quotation marks omitted). We further stated that, "irrespective of the legality of the initial [action], we can nevertheless examine the balance of the underlying search warrant affidavit for probable cause in order to determine whether the lawfully obtained evidence was sufficient to determine that the search and seizure should be upheld." *Id.* (citations and quotation marks omitted); *see also United States v. Black*, 8 Fed. Appx. 408, 411-13 (6th Cir. 2001) (relying on *Herrold* to strike factual averments "tainted" by an illegal search from an affidavit and holding

that probable cause existed even without that information); *cf. United States v. Dice*, 200 F.3d 978, 985-86 (6th Cir. 2000) (holding that violation of knock-and-announce rule during execution of valid search warrant precluded application of the independent source rule to evidence seized in search following violation).[9]

This court also adopted a similar approach in pre-*Murray* cases. For instance, in *United States v. Smith*, 730 F.2d 1052, 1056 (6th Cir. 1984), two defendants argued that an affidavit in support of a search warrant contained information obtained during an illegal search incident to the arrest of one of the defendants. The court did not decide whether the search during the course of the arrest was impermissible, finding that even if it were, there was sufficient probable cause for the search warrant to issue based upon pre-arrest observations. *Id.* The court stated:

> [I]t is well settled that: when a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, if the lawfully

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[9] In *United States v. Dice*, this court refused to adopt a rule, "derivative of the 'independent source doctrine,'" that when police officers violate the knock-and-announce requirement but have a valid warrant, the exclusionary rule should not apply to any evidence obtained as a result of the search. 200 F.3d at 982. The court distinguished cases such as *Murray* as involving two searches (an illegal search followed by a second, legal search), instead of just one search involving a Fourth Amendment violation. *See id.* at 985-86. While the argument could feasibly be made that this reasoning applies to the present case, in that Riolo's initial squeezing of the bags was part of the same search carried out after the warrant issued, the holding of *Dice* is limited to the knock-and-announce situation. *See id.*

> obtained information amounts to probable cause and would have justified issuance of the warrant apart from the tainted information, the evidence seized pursuant to the warrant is admitted.

Id. (citations and quotations omitted). Likewise, in *United States v. Korman*, 614 F.2d 541, 547 (6th Cir. 1980), the defendant argued that certain evidence obtained as a result of an allegedly illegal initial search of the defendant's residence was included on an affidavit for a search warrant of that residence. This court held that irrespective of any illegally obtained information in the affidavit, there was sufficient "independent and legitimately obtained evidence" to establish probable cause.*Id.*

In sum, authority from this and other circuits, as well as the principles underlying the *Murray* rule, support an interpretation of the independent source rule that incorporates consideration of the sufficiency of the untainted affidavit to see if probable cause exists without the tainted information. Applying this approach to the present case, once the tainted information – the information orally conveyed to Judge Corrigan – is eliminated, the probable cause analysis focuses on the written affidavit. A court determining the sufficiency of an affidavit in support of a search warrant is concerned only with the statements contained within the affidavit itself. *United States v. Hatcher*, 473 F.2d 321, 323 (6th Cir. 1973). Defendants-appellees argue that the affidavit for Room 127, when examined without the tainted information, is a "bare bones" affidavit that does not indicate "a 'fair probability' that evidence of a crime will be located on the premises of the proposed search." *United States v. Bowling*, 900 F.2d 926, 930 (6th Cir. 1990) (quoting *United States v. Algie*, 721 F.2d 1039, 1041 (6th Cir. 1983)). As defendant-appellee Thompson himself points out in his brief, though, "it has been

the rare case in which the Sixth Circuit has found a search warrant based on an informant tip to be inadequate *if* the information has been corroborated to some degree." Indeed, the affidavit for Room 127 contains a particularized account of facts and circumstances that amount to a "fair probability" that evidence could be found in the room, including: the payment of cash, the suspicious driving pattern of the Suburban, the criminal history of the renter of the room and the owner of the Suburban, the police canine's positive indication for narcotics in the Suburban, and the marijuana found on Jenkins. Taken by itself, and considering the totality of the circumstances, the affidavit provides sufficient probable cause for the warrant. *See Illinois v. Gates*, 462 U.S. 213, 230-32, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Thus, the district court erred in suppressing the cocaine, because there was a sufficient basis for the warrant that was wholly independent from any "tainted" information orally communicated to the issuing judge.

B.

The government next argues that the district court erred in suppressing the evidence because the good faith exception to the exclusionary rule applies. The question whether the good faith exception to the exclusionary rule, as set out in *United States v. Leon*, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), applies is a question of law reviewed *de novo* by this court. *Bowling*, 900 F.2d at 930. In *Leon*, the Supreme Court held that evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate need not be excluded from presentation at trial, even if the warrant is subsequently invalidated. 468 U.S. at 922. The test of good faith is an objective one: "whether a reasonably well trained

officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23.

The government's reliance on the good faith exception is erroneous. The illegal search at issue - the officers' inspection of the bags in Room 127 - occurred *before* the warrant was issued, and thus the cocaine could not be admissible under a doctrine that requires reasonable reliance on a warrant. Put simply, there was no warrant upon which the officers could rely in good faith. *Cf. United States v. Marion*, 238 F.3d 965, 967-70 (8th Cir. 2001) (applying the good faith exception to evidence seized in a search carried out after the warrant issued, even though the affiant officer was one of the executing officers). Though the government emphasizes them in its brief, the facts that the officers "deferred any substantial searching until after the warrant was obtained" and that the illegal touching of the bags was "brief and occurred after a lawful entry to secure the premises" are immaterial. The district court was correct not to apply the *Leon* good faith exception with respect to the cocaine.

C.

The final issue to consider is whether the district court erred in suppressing the fruits of the search of 11906 Imperial because there is a sufficient basis for the warrant even when the underlying affidavit is stripped of references to any "tainted" information. In reviewing the district court's decision whether probable cause existed to issue a search warrant, this court employs a deferential standard and seeks to determine whether "the facts and circumstances described in the affidavit indicate a 'fair probability' that evidence of a crime will be located on the premises of the proposed search." *Bowling*, 900 F.2d at 930 (citation omitted); *see also United States v. Spikes*, 158 F.3d 913, 922-23 (6th Cir. 1998)

("The ultimate question of whether the search or seizure is reasonable under the Fourth Amendment remains subject to *de novo* review."); *Restrepo*, 966 F.2d at 971 (reviewing a probable cause determination *de novo* after expunging the warrant affidavit of tainted information).

Since we have decided that there was sufficient probable cause for the Room 127 warrant even without the tainted information, then there is no need to strike the reference to the cocaine found in Room 127 from the warrant affidavit for 11906 Imperial. With this reference intact, it is clear that probable cause existed to search the residence. The affidavit connected the residence to the cocaine in Room 127 in two different ways: first, through the Explorer used by the two men checking into the room, and second, through the phone number given by Andre Jenkins (who had exited from Room 127) to Officer Sanchez at the jail. Considering seventy-three kilos of cocaine had been found in Room 127, this information was clearly enough to demonstrate a "'fair probability' that evidence of a crime" would be located at 11906 Imperial. *Bowling*, 900 F.2d at 930 (citation omitted). Therefore, since we hold that the district court erred in suppressing the cocaine, then the warrant for 11906 Imperial is valid, and the district court also erred in suppressing the evidence obtained from the search of that address.

III.

The district court did not err in failing to apply the good faith exception to the exclusionary rule to the cocaine. However, the cocaine should still have been admitted because there was a sufficient basis for the Room 127 warrant that was wholly independent from any "tainted" information orally communicated to the issuing judge. Therefore, for the reasons set forth above, we reverse the district court's ruling

suppressing the evidence from both the search of Room 127 and the search of 11906 Imperial and remand the case for trial on the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DOCKET NO. 1:03CR112

[Filed June 15, 2003]

UNITED STATES OF AMERICA, Plaintiff	)
v.	)
ANDRE JENKINS, NATHANIEL S. THOMPSON, Defendants	)

Lesley Wells. UNITED STATES DISTRICT JUDGE

MEMORANDUM OF OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO SUPPRESS

Before the Court are three motions to suppress. In his first motion, Mr. Jenkins seeks to suppress the $68,000 in U.S. currency, $17,000 Rolex watch, and two firearms found during the search of Bonnie Jones' residence at 11906 Imperial in Cleveland. (Docket # 16). In his second motion,

Mr. Jenkins seeks suppression of the 73 kilograms of cocaine discovered during the search of Room 127 of the Holiday Inn in Beachwood, Ohio. (Docket # 28). Mr. Thompson moves to suppress only the cocaine from the hotel room. (Docket # 35). The government filed oppositions to the three motions. (Docket # 36, 37). An extensive three-day evidentiary hearing was held on 29 May 2003, 3 June 2003, and 4 June 2003.

Based on the evidence adduced at the suppression hearing and the relevant law, this Court will grant each of defendants' motions to suppress.

I. FACTUAL BACKGROUND

The facts surrounding the two searches at issue are largely undisputed. At approximately 11:00 p.m. on 13 February 2003, two men, who turned out to be Andre Jenkins and Nathaniel Thompson, entered the Beachwood Holiday Inn off the exit at Route 271 and Chagrin Boulevard and inquired about renting a room. Mr. Jenkins did most of the talking, but Mr. Thompson provided his ID, which showed that he lived on the east side of Cleveland. They rented Room 127 for two days and paid in cash. Robert Jeffreys, the front office manager who checked-in the men, issued only one electronic room key but did not see which man took the key. Mr. Jeffreys observed the men straining to unload bags from a black Ford Explorer onto a luggage cart. Suspicious of this behavior, Mr. Jeffreys wrote down the license plate number of the Ford Explorer. He then called Officer John Kornek of the Beachwood Police and of the High Intensity Drug Trafficking Area Task Force ("HIDTA"). Mr. Jeffreys relayed his observations to Officer Kornek and told him that the two men had left the hotel after unloading the bags and pushing the cart down the hallway towards Room 127. Mr.

Jeffreys had provided information to Officer Kornek on several past occasions.

Officer Kornek, in turn, called Officer Kevin Grisafo of the Beachwood police and HIDTA. After being told what Officer Kornek knew, Officer Grisafo drove to the Holiday Inn. He spoke with the Holiday Inn desk staff and reviewed the registration slip for Room 127, which showed that the room was registered to Nathaniel Thompson. Officer Grisafo walked past the room and noticed that a "Do not disturb" sign was hanging on the door. At this point, Officer Grisafo ran a criminal history check on Mr. Thompson and on Bonnie Jones, the woman to whom the black Ford Explorer was registered. Each had a criminal record. Officer Grisafo acquired the room across the hall from Room 127 and contacted IRS Special Agent Mark Kahler of HIDTA, who sent three officers to conduct surveillance from the acquired room. Officer Grisafo watched the hotel from his unmarked vehicle in the Olive Garden restaurant parking lot across the street.

At approximately 4:30 a.m., a black Suburban entered through the south entrance of the Holiday Inn lot, immediately left through the north entrance, turned around, re-entered the Holiday Inn lot, dropped off a female at the main lobby, then left again, and parked at the Super 8 motel lot across and farther up the street. The Holiday Inn parking lot was mostly empty. The driver of the Suburban, Mr. Jenkins, half-jogged over to the side entrance of the Holiday Inn, used an electronic room key card to enter, met with the female who had been sitting in the lobby, and entered Room 127 with her. A license plate search of the Suburban showed that it was registered to a Lacell Torrence, whose criminal history showed that he had been arrested on several occasions.

At 8:30 a.m., on 14 February, a police canine was walked around the Suburban in the Super 8 lot and gave a positive indication for the presence of narcotics in the vehicle. At about 11:55 a.m., Mr. Jenkins left Room 127 and headed for the Suburban in the Super 8 parking lot carrying towels. At this time, none of the officers knew his identity. After Mr. Jenkins placed the towels in the back of the Suburban, FBI Agent Kenneth Riolo of HIDTA confronted him. Mr. Jenkins gave his name, stated that he had been applying for a job across the street, and denied having any knowledge of Room 127 or the woman in the room. Agent Riolo arrested Mr. Jenkins and found on his person a small amount of marijuana, $ 1500 in cash, two cell phones, and a pager. Officer Grisafo then arrived on the scene. Agent Riolo told him and two other officers, Kornek and Guerra, to secure Room 127 in anticipation of a search warrant, which Agent Kahler had been preparing throughout the night while receiving updates from Officer Grisafo. Agent Riolo testified that he was concerned that the woman in the room may have witnessed the commotion in the Super 8 parking lot because two marked cruisers were present for Mr. Jenkins' arrest and there was a clear view from the window of Room 127 to the parking lot. He stated that he wanted to secure the room in order to prevent the destruction of any evidence there.

There is conflicting testimony as to how the police entered Room 127. Officers Grisafo and Kornek testified that Sergeant Guerra knocked on the door, which the woman, later identified as Joyce Bell, opened. According to the officers, they identified themselves and told her that they were securing the room and were in the process of obtaining a search warrant. They testified that Ms. Bell, dressed in panties only, let them in. Officer Kornek then took Ms. Bell to the chair at the far side of the room, which he first checked

for weapons, so she could get dressed and be questioned. He patted down her clothes before she put them on.

Ms. Bell describes the situation differently. According to her, a female housekeeper knocked on the door. Ms. Bell then opened the door partially and placed her arm out to collect towels. She said she was using the door as a shield because she was wearing only panties. Ms. Bell testified that the officers "busted in the room," pushing the door open with enough force to hit her in the face and knock her onto the ground and into the closet. She testified that a gun was pointed at her. As Ms. Bell explains it, the officers did not identify themselves for several minutes.

Testimony regarding the bags in the room and Ms. Bell's purported consent to a search is more consistent. According to Ms. Bell, when she entered Room 127 the night before, a few duffle bags had been placed between the two beds. She did not touch the bags. Mr. Jenkins later moved the bags so that they were between the length of one bed and the wall. Ms. Bell testified that this is where the bags were when the police entered. This correlates with what Officer Kornek said about the bags: when he first entered the room, three full bags were stacked along the wall with one empty bag lying nearby. There was a large black bag on the bottom of the stack with a green bag in the middle and another black bag on the top. Officer Kornek testified that, although he and Ms. Bell did not touch the bags, he noticed one of the bags, the green bag, on the bed a short time later. The zipper of the green bag was partially open. Officer Kornek testified that this only became visible after the black bag on the top of the pile was moved. He said he did not know how the bag was moved; he had not been paying attention to the activities of the other officers, who could have "grabbed" or opened the bags.

Instead, Officer Kornek was interviewing Ms. Bell. A few minutes after the initial entry, he asked Ms. Bell if she had a problem with the officers searching the room and the bags in particular. According to Officer Kornek, Ms. Bell stated "no, not at all, they are not [mine] and [I don't] know what's in them." Ms. Bell's testimony is consistent in this regard. She testified that she consented to the search. However, Ms. Bell told Officer Kornek that she was just a student, the room was not hers, and that she was just there with Mr. Jenkins.

Officer Grisafo also testified that Ms. Bell consented to a search of the room and all its contents. Once he heard the consent, Officer Grisafo, who had been standing in the doorway, moved further into the room. He testified that, having moved into the room far enough to see the bed, he saw a pile of two or three bags between the wall and the bed and one bag on top of the bed. According to Officer Grisafo, "I saw the bag that was on the bed was wide open and I could see brick type items in there wrapped in cellophane, which from prior history, this is how narcotics is wrapped." Officer Grisafo said that the bag was so full that "it was unzipped enough where it was pulling apart." He testified that he did not know the location of the bags at the time of the initial entry and could not see from the doorway whether another officer moved the bags in those first few minutes. He testified that he did not touch the bags.

About five minutes after the initial entry, Agent Riolo entered the room. He saw the room key sitting on the night stand between the beds. He also saw at least the green bag, and maybe a black bag, on the bed. The large black bag was against the wall. According to Officer Riolo, the zipper of the green bag was partially open such that he could see orange items inside. The officers informed him that Ms. Bell had consented to a search, but Agent Riolo told them that they

were going to wait for a warrant. At that point, according to his own testimony, Agent Riolo proceeded to pick up and squeeze the bags. He stated, "I picked all the bags up and felt them to see how heavy they were. They were full." He went on to say, "the biggest bag on the floor was probably about a hundred pounds ... The other bags were all heavy and you could feel the bricks inside." When asked during the hearing why he picked up the bags before a warrant was obtained, Agent Riolo testified, "I just felt I should touch them and see what there was inside. If it was soft and it was clothes or maybe, I just wanted to feel them and see how heavy they were and get that information back to Mr. Kahler." Agent Riolo also explained that he squeezed the green bag, and that, from the squeeze, he determined that there were brick-like objects in the bag.

As Agent Riolo entered the room, Officer Grisafo left to meet Agent Kahler at the HIDTA office to complete work on the warrant affidavit. Shortly thereafter, Ms. Bell was taken from the room. According to Ms. Bell, this occurred five to ten minutes after the initial police entry. She testified that, before she left, she saw the officers opening drawers and looking behind curtains.

Before Officer Grisafo had returned to HIDTA headquarters, Agent Kahler had been informed of the presence of brick-like objects in the bags. Agent Kahler and Officer Grisafo completed their work on the warrant affidavit and drove to the Justice Center in order to present the search warrant for Room 127 to a judge for signature. On the way, Agent Kahler spoke with an assistant county prosecutor, who told him to make sure that the judge was told that the room had been secured.

Agent Kahler had made a conscious decision to exclude any mention of the hotel informant in the affidavit in order to protect the source. The observed presence of brick-like objects also was omitted from the affidavit. When Agent Kahler and Officer Grisafo met with Judge Brian Corrigan, however, the officers orally communicated everything they knew about the situation to the judge. Agent Kahler testified that he was certain that he told the judge that officers had observed brick-shaped items in the bags. He reiterated this point during his testimony, stating that there was no doubt in his mind that this information was relayed to Judge Corrigan.

Judge Corrigan signed the search warrant at 1:30 p.m. on 14 February. Still in the judge's chambers, Officer Grisafo notified Agent Riolo, in Room 127, who then opened the green bag, pulled out a brick, and confirmed that it was cocaine. This information was immediately passed on to the judge. A total of 73 kilogram-bricks of cocaine were found in the bags.

Later that day, at 5:30 p.m., Mr. Jenkins was being booked at the county jail. Three or four times, he asked Corrections Officer Eugene Sanchez, who he knew from prior jail stays, if he could make a phone call. As this was not permitted, Officer Sanchez ripped a piece of a brown paper bag and gave it to Jenkins to write the name and number of the person he wanted to call. Officer Sanchez told Mr. Jenkins that he would place the call on his behalf, although he did not do so. Mr. Jenkins wrote down the name "Bonn" and a phone number. He told Officer Sanchez to "let Bon know to clean up, they are coming." Officer Sanchez relayed this information to Officer Kornek, who traced the phone number to a Mr. Jones at 11906 Imperial.

Once Officer Randy Wilson of the City of Independence police and HIDTA was given this information, he began preparing a search warrant for 11906 Imperial. He testified that he understood from what he had been told that Mr. Jenkins' said "get the shit out, the police are coming." He and Agent Kahler went to Judge Corrigan's residence between 10:00 p.m. and 10:30 p.m. that evening. Judge Corrigan signed the warrant for 11906 Imperial, which was executed that night. $68,000 in U.S. currency, a $17,000 Rolex watch, and two firearms were found during the search of Bonnie Jones' residence at 11906 Imperial.

II. LAW AND ANALYSIS

There are several issues before the Court. First, there is a question as to whether Mr. Jenkins has standing to raise his Fourth Amendment challenges. Second, the government and the defendants disagree as to whether Joyce Bell's consent to search Room 127 and the bags within it was valid. Third, the defendants contend that there were no valid exigent circumstances to justify the warrantless entry into Room 127. If there was a valid exigency, the defendants argue that the officers exceeded the scope of the exigency while in the room. Next, the defendants argue that the warrant for Room 127 was defective and could not reasonably be relied on by the officers. Finally, there is the question of the validity of the warrant and search of 11906 Imperial. The Court will address these issues in turn.

A. Standing

The government contests Mr. Jenkins' standing to assert Fourth Amendment claims with respect to Room 127 of the Holiday Inn and the residence at 11906 Imperial.

A defendant has the burden of establishing his standing to challenge a search in violation of the Fourth Amendment. *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1510 (6th Cir. 1988). According to the Sixth Circuit, "the defendant must satisfy a two-part test: (1) whether he manifested a subjective expectation of privacy in the object of the challenged search; and (2) whether society is prepared to recognize that expectation as legitimate."

Mr. Jenkins has established his standing to challenge the search of Room 127. He entered the room with an electronic key and spent the night there. There is no question that he had an expectation of privacy in the hotel room where he slept and that such an expectation is legitimate. Federal courts consistently have held that hotel rooms, like residences, can create an expectation of privacy for Fourth Amendment purposes. *United States v. Allen*, 106 F.3d 695, 698 (6th Cir. 1997); *Minnesota v. Olson*, 495 U.S. 91, 95-99, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).

Mr. Jenkins also has standing with respect to the search of 11906 Imperial. The owner of the house, Bonnie Jones, testified at the hearing. She stated that Mr. Jenkins had been her boyfriend for four years and that, at the time of the search, he was living with her at 11906 Imperial, as he had done for the last two years. According to Ms. Jones, Mr. Jenkins slept at the house approximately five nights a week, kept clothes and personal effects in the house, and occasionally received mail there. She stated that he had full access to the residence. She also testified that she was not aware of any other place he had to stay.

Aside from an isolated reference by an officer to a statement made by Ms. Jones' daughter that Mr. Jenkins slept in the house only once every week or two, Ms. Jones'

testimony is uncontradicted. This Court finds that Mr. Jenkins did live and sleep at 11906 Imperial and, therefore, had an expectation of privacy in the residence and his effects there. No authority need be cited for the proposition that one's expectation of privacy in one's home is recognized by society as legitimate.

Thus, Mr. Jenkins has standing to challenge the searches of Room 127 and 11906 Imperial.

B. Consent to Search Room 127

The defendants contend that Joyce Bell's consent to the search of Room 127 and the duffle bags was invalid. Specifically, they argue that (1) she lacked actual or apparent authority to consent to the search and (2) her consent was involuntary. As the first argument is dispositive, the Court will not examine the second.

The Fourth Amendment generally prohibits the warrantless entry of a person's home or hotel room to search for specific objects. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). However, this prohibition does not apply to situations in which voluntary consent has been obtained from the individual whose property is to be searched or from a third party who possesses common authority over the premises. *Id.* Common authority rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 172, n. 7, 94 S. Ct. 988 39 L. Ed. 2d 242 (1974). Even if the person giving consent does not have actual,

common authority over the premises, the consent is valid if the person has apparent authority. In such a situation, a search pursuit to consent is valid if the facts available to the officer at the time would lead the officer to reasonably believe that the consenting party has authority over the premises. *Rodriguez*, 497 U.S. at 188-189. This is an objective standard. *Id*. In the end, the burden is on the government to prove by a preponderance of the evidence that a consent is valid. *Matlock*, 415 U.S. at 177.

Ms. Bell did not have actual authority to consent to a search of Room 127 or the bags within it. The room was registered to Nathaniel Thompson, not her. She was not present when Mr. Thompson and Mr. Jenkins checked-in to the room. There is no evidence that she paid any portion of the rent for the room. All the testimony indicates that she arrived at 4:30 a.m. and was merely a night-time guest. Ms. Bell herself testified that it was not her room and that she was just there with Mr. Jenkins. She initially obtained access to the room only because Mr. Jenkins opened the door with the electronic key he had. Although there is testimony from Agent Riolo indicating that Mr. Jenkins left the key with Ms. Bell when he departed at 11:55 a.m. on 14 February, Ms. Bell testified that she was not aware of the presence of the key.

Moreover, Ms. Bell did not have common authority over the bags. She testified that the bags were not hers and that she never touched them. All of the testimony establishes that Mr. Thompson and Mr. Jenkins transported the bags to the room, not her. Thus, Ms. Bell did not have use of the bags or control over the bags. Ms. Bell testified that Mr. Jenkins told her to tell the housekeeper not to touch the bags. Mr. Jenkins, therefore, did not assume the risk that she would consent to the searching of the bags.

Ms. Bell did not have apparent authority over the bags either. No officer could have reasonably believed that she had authority to consent to the search of the room or the bags. The officers on the scene knew that the room was registered to Mr. Thompson, that he or Mr. Jenkins paid for the room, and that Ms. Bell only arrived at 4:30 a.m. Ms. Bell explicitly told them that it was not her room and that she was there with Mr. Jenkins. Furthermore, the officers knew only of Mr. Thompson and Mr. Jenkins transporting the bags. Ms. Bell explicitly stated that the bags were not hers when she consented to the search. Under these circumstances, the officers could not reasonably believe that Ms. Bell had authority to consent to a search of Room 127 or the bags.

As the government has failed to meet its burden of demonstrating that Ms. Bell had actual or apparent authority to consent to a search of Room 127 or the bags within, her consent is invalid and cannot justify any warrantless entry or search.

C. Warrantless Entry and Search of Room 127

The next issue concerns the alleged warrantless entry and search of Room 127. The defendants allege that the officers entered Room 127 without a warrant and in the absence of exigent circumstances and that, even if exigent circumstances were present, their search of the bags exceeded the scope of the exigency. The government counters that the possible destruction of evidence justified securing the room and, in conjunction with officer safety concerns, justified remaining in the room for some time before a warrant was obtained. This Court will assume, without deciding, that the exigencies asserted by the government were present and justified the securing of Room 127 in anticipation of a warrant. However, the Court finds that the officers' search of the bags exceeded

the scope of the exigencies and, therefore, violated the Fourth Amendment.

The Sixth Circuit has explained,

> Warrantless searches [of residences and hotel rooms] are per se unreasonable under the fourth amendment, except in a few carefully delineated instances. The exigent circumstances exception relies on the premise that the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant. Under exigent circumstances, a warrantless entry may be required to secure evidence that is in the process of being lost or destroyed. Such warrantless entries and searches are "presumptively unreasonable." Therefore, the government bears the "heavy burden" of demonstrating exigency.

United States v. Radka, 904 F.2d 357, 360-361 (6th Cir. 1990) (internal citations omitted). The possible destruction of evidence or a risk of danger to police or others are two situations that can satisfy the exigent circumstances exception. *United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994). However, "a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). *See also*, *Johnson*, 22 F.3d at 680; *United States v. Socey*, 269 U.S. App. D.C. 453, 846 F.2d 1439, 1445 (D.C. Cir 1988) (stating "Once police officers have the requisite belief that destruction of evidence is imminent, their entry must be limited in scope to the minimum intrusion necessary to prevent the destruction of evidence"); *United States v. Halliman*, 287 U.S. App. D.C. 380, 923 F.2d 873, 880 (D.C. Cir. 1991) (same).

The government argues that the possible destruction of any evidence in Room 127 justified the officers' warrantless entry to secure the room. The officers' concern was that the woman in the room, whose identity was unknown to the police, could have seen the arrest of Mr. Jenkins and proceeded to destroy evidence. The officers also testified to their concern that, once in the room, they needed to ensure that no one entered through the window (to either destroy evidence or harm someone). Several officers testified that they were unsure of Mr. Thompson's location and thought that he might return to the room and threaten officer safety.

For the purpose of this analysis, the Court will assume that the destruction of evidence and officer safety concerns justified a warrantless entry to secure the room. Nevertheless, the testimony of the officers themselves demonstrates that their actions went beyond the scope of these exigencies. From their surveillance, the officers knew that there was no one but Ms. Bell in the room to destroy evidence. To prevent the destruction of evidence, the officers only needed to remove Ms. Bell from the hotel room when she opened the door and then close and guard both the door and the window. If officers were posted at the door and window, the officers could be sure that no one else could enter to destroy evidence. The obvious presence of officers also would likely alleviate any threat to officer safety. Officer Grisafo testified that, if officers were so posted, he believed that Mr. Thompson would not return to present any danger. He also testified that they could have brought Ms. Bell to their room across the hall and that he considered the room secured when he had Ms. Bell under his control. Officer Kornek testified that there was no officer safety concern once he saw Ms. Bell in only panties with no weapon.

Yet, instead of securing and sealing the room or even securing and simply remaining in the room, the officers proceeded to conduct warrantless searches of the room. There were two distinct searches that were not justified by the exigent circumstances.

First, before Agent Riolo arrived in the room, one of the officers moved some of the bags. Based on the testimony of Joyce Bell and Officer Kornek, this Court finds that, at the time of the initial entry, three bags were stacked against the wall with one bag lying on the floor nearby. The Court also finds, based on the testimony of Officer Kornek and Officer Grisafo, that, shortly after the entry, at least one bag was on the bed. As Officer Kornek testified that Ms. Bell did not touch the bags, one of the three officers must have moved the bags. Further, the officers testified that they could see into the bag on the bed because it was partially unzipped. As Officer Kornek testified, this opening became visible only after the bag on the top of the pile was moved. Thus, an officer moved a bag from the pile to the bed and, in so doing, allowed the officers to see into the bag in a way they could not have done had it not been moved. Under Supreme Court precedent, this is a search. In *Arizona v. Hicks*, the Supreme Court held that moving suspicious stereo components in order to examine their serial numbers was a search. 480 U.S. 321, 323-326, 107 S. Ct. 1149, 94 L. Ed. 2d 347. Similarly to the officer in *Hicks*, the officers here moved a bag without a warrant and then peered inside the newly-visible opening.

The second warrantless search of the bags was initiated by Agent Riolo. Based on Agent Riolo's testimony, this Court finds that he picked up each of the bags and squeezed at least one of them. His only rationale for these actions was that he "felt he should touch them and see what was inside." The squeezing of the bags led Agent Riolo to the conclusion that

there were bricks inside. Under Supreme Court precedent, this picking up and squeezing of the bags is a search. In *Bond v. United States*, an officer squeezed the soft luggage of bus passengers without a warrant. 529 U.S. 334, 335-336, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000). Noting that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection," the Supreme Court held that the squeeze was a search. *Id.* at 337.

Neither of these warrantless searches was justified by concerns of destruction of evidence or officer safety. The room was secure and the only non-officer in the room was unarmed, getting dressed, and being questioned. No one needed to move, pick up, or squeeze bags to protect evidence or officer safety. Doing so was unnecessary and exceeded the scope of the exigent circumstances. Accordingly, the officers violated the Fourth Amendment with these warrantless searches, which fell outside the scope of the prevailing exigencies.[1]

The subsequent search warrant obtained for Room 127 does not remove the taint of these illegal searches. "Under the independent source doctrine, evidence will be admitted if the government can show it was discovered through sources 'wholly independent of any constitution violation.'" United *States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996). Thus, if the subsequent warrant was "wholly independent" of the illegal searches of the bags, the cocaine in the bags would be admissible. Here, however, the warrant was not "wholly independent" of the illegal searches. Agent Kahler testified that he knew that there were brick-like objects inside the bags

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[1] In making this determination, the Court does not rely on Joyce Bell's testimony that officers were opening drawers.

(the results of the illegal searches) and is certain that he relayed this information to Judge Corrigan before the judge signed the warrant for Room 127. The fruits of the illegal searches, then, were one of the pieces of information made available to Judge Corrigan before he issued the warrant. Because the warrant was not "wholly independent" of the illegal searches, the independent source doctrine does not apply here.

"The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search." *Murray v. United States*, 487 U.S. 533, 536, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (internal citations omitted). As the warrantless searches of the bags were unlawful, the 73 kilograms of cocaine found in the bags must be suppressed under the exclusionary rule.

D. Search of 11906 Imperial

Under the fruit of the poisonous tree doctrine, "the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." *Murray*, 487 U.S. at 536-537 (internal quotation marks omitted). Where factual statements regarding products of an illegal search are contained in a subsequent warrant affidavit, the question "is whether, despite any impermissibly tainted factual averments in the affidavit, the warrant nevertheless issued upon probable cause." 8 Fed.Appx. 408, 411 (6th Cir. 2001).

In this case, the affidavit for the search warrant for Bonnie Jones's residence at 11906 Imperial includes "tainted factual averments" from the illegal searches of the bags in Room 127. In its entirety, the affidavit recounts (1) Mr. Thompson's check in at the hotel; (2) Mr. Thompson's arrival in the Ford Explorer registered to Bonnie Jones, who lives at 11906 Imperial; (3) Mr. Thompson's criminal record; (4) the arrival of Mr. Jenkins and Ms. Bell in the Suburban registered to Lacell Torrence, who also had a criminal record; (5) the police canine's positive indication for the presence of narcotics in the Suburban; (6) the small amount of marijuana and $1500 found on Mr. Jenkins when he was arrested; (7) the 73 kilogram-packages of cocaine found in Room 127; (8) the interaction of Mr. Jenkins and Mr. Thompson at a garage; (9) Mr. Jenkins' statement to Corrections Officer Sanchez and the sheet of paper with the name "Bonn" and a phone number that traced back to 11906 Imperial; and (10) the observed presence of the Ford Explorer in the driveway of 11906 Imperial.

The question is whether there was probable cause to believe that there was evidence of illegal drug activity at 11906 Imperial once the facts relating to the fruits of the illegal searches are eliminated from the warrant affidavit. The warrant cannot rely on the 73 kilograms of cocaine found in Room 127. Moreover, without referring to the drugs transported in the Ford Explorer, little significance can be assigned to the links between the Ford Explorer and 11906 Imperial. There is no demonstrated link between the Suburban and 11906 Imperial. Essentially, the affidavit is left with the following facts to support a search warrant: (1) Mr. Jenkins, who was in the Ford Explorer which was registered to the resident of 11906 Imperial, was found with a small amount of marijuana on his person and (2) Mr. Jenkins told Officer Sanchez to "let Bonn know to clean up, they are coming" and

gave him a telephone number for 11906 Imperial. This is simply not enough to establish probable cause to search 11906 Imperial. That a man with some relationship to a residence is found carrying marijuana does not provide probable cause to believe that there are drugs in the residence. Mr. Jenkins' statement does not refer to what should be cleaned up or where. Without reference to the cocaine discovered shortly before he made his statement, the statement loses most of its significance. In the end, there is no reliable link between any drug activity and the residence at 11906 Imperial.

Accordingly, there was no probable cause to search 11906 Imperial and the search warrant was defective. The $68,000 in U.S. currency, $17,000 Rolex watch, and two firearms found during the search of Bonnie Jones' residence at 11906 Imperial must be suppressed.

III. CONCLUSION

For the reasons discussed above, the three motions to suppress are granted. At trial, the government may not introduce into evidence the 73 kilograms of cocaine found in Room 127 or the $68,000 in U.S. currency, $17,000 Rolex watch, and two firearms found at 11906 Imperial. Nor may the government offer testimony concerning knowledge acquired during the unlawful searches of the bags in Room 127 or of the residence at 11906 Imperial.

IT IS SO ORDERED.

/s/_____

Lesley Wells
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 24 2005
OFFICE OF THE CLERK

(2) (1)

Nos. 04-1445 and 04-9907

In the Supreme Court of the United States

NATHANIEL S. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ANDRE JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence seized pursuant to a search warrant was admissible under the "independent source" doctrine when part of the information on which the warrant was based had been obtained in an unlawful search, but probable cause existed even without that information.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a)[1] is reported at 396 F.3d 751. The opinion of the district court (Pet. App. 20a-39a) is reported at 285 F. Supp. 2d 999.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1445.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2005. The petition for a writ of certiorari in No. 04-1445 was filed on April 26, 2005, and the petition in No. 04-9907 was filed on April 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the Northern District of Ohio on one count each of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2000 & Supp. II 2002). Petitioners moved to suppress cocaine seized during a search of a hotel room; petitioner Jenkins also moved to suppress items seized during a subsequent search of a house. The district court granted both motions. Pet. App. 20a-39a. The court of appeals reversed and remanded for further proceedings. *Id.* at 1a-19a.

1. On the evening of February 13, 2003, petitioners checked into a Holiday Inn in Beachwood, Ohio. Paying cash, they reserved a room for two nights. Petitioner Thompson provided identification, which the desk clerk photocopied and then returned to him. After checking in, petitioners went to their vehicle, unloaded several bags (which appeared to be very heavy), and took those bags to their room. Finding these circumstances to be suspicious, the desk clerk contacted John Kornek, a local police officer and member of the Ohio High Intensity Drug Trafficking Area (HIDTA) Task Force. Pet. App. 2a, 21a.

Officer Kornek contacted Officer Kevin Grisafo, another local police officer and HIDTA Task Force member, and asked him to go to the hotel to investigate. Of-

ficer Grisafo ran checks on petitioner Thompson and on petitioners' vehicle. He learned that Thompson had been arrested twice for drug-related offenses and had been convicted for carrying a concealed weapon, and that the vehicle was registered to a woman who was living in Cleveland and had been convicted of drug-related and other offenses. Officer Grisafo summoned backup, and he and other officers began surveilling petitioners' room. Pet. App. 3a, 22a.

Around 4:25 a.m., Officer Grisafo saw a Chevrolet Suburban enter, exit, and then re-enter the hotel parking lot. After a woman (later identified as Joyce Bell) left the Suburban and went into the hotel, the Suburban again exited the lot and parked across the street, even though the lot had ample free spaces. Petitioner Jenkins, who was driving the Suburban, then returned to the hotel and, after rejoining the woman, entered his room. Officer Grisafo ran a check on the Suburban and learned that it was registered to a man who had been arrested on several occasions. Pet. App. 3a-4a, 22a-23a.

Around 8:30 a.m., a police drug-detection dog alerted to the presence of narcotics in the Suburban. Around noon, petitioner Jenkins left the hotel room and was approached by Federal Bureau of Investigation Agent Kenneth Riolo, a HIDTA Task Force member. Jenkins identified himself, denied having been in the hotel room, and denied having any contraband on his person. Agent Riolo arrested Jenkins and, after searching him, found a small bag of marijuana, two mobile phones, a pager, and $1500 in cash. Pet. App. 3a-4a, 23a.

Believing that Bell may have witnessed Jenkins's arrest through the window of the hotel room, Agent Riolo directed other officers at the scene to secure the room in order to protect their safety and to prevent the

destruction of evidence. The officers later testified that Bell allowed them into the room; Bell testified that the officers forcibly entered. Pet. App. 4a-5a, 23a-24a.

Upon entering, the officers asked Bell if she would consent to a search of the room, including several bags stacked against the wall. Bell consented, but indicated that neither the room nor the bags were hers. It appears that, at some point, an officer moved one of the bags to the bed; the bag was sufficiently unzipped that officers could see brick-shaped items wrapped in cellophane inside. Pet. App. 5a, 24a-25a.

Agent Riolo entered the room about five minutes after the other officers. Upon learning that Bell had consented to a search of the room, Agent Riolo told the officers that they should wait for a warrant before conducting the search. Agent Riolo, however, proceeded to pick up all of the bags and feel them, determining that they were full of "bricks" and very heavy. Pet. App. 5a-6a, 25a-26a.

While events at the hotel were unfolding, officers at the hotel were in contact with Internal Revenue Service Agent Mark Kahler, a HIDTA Task Force member who was preparing an affidavit for a search warrant for the hotel room. Before the affidavit was filed, Agent Kahler was informed, apparently by Agent Riolo, that the bags in the room contained brick-shaped objects. Agent Kahler did not include that information in the affidavit because he believed that the affidavit was already "more than sufficient." As Agent Kahler presented the affidavit to the magistrate, however, he orally informed the magistrate about the discovery of brick-shaped objects in the bags. When asked whether he thought that information influenced the magistrate's decision to issue the warrant, Agent Kahler later testified that, "if I thought

it affected his decision as much as occurred in the past, he would have instructed me to add a paragraph [to the affidavit]." The magistrate issued the warrant. While Agent Kahler was still in the magistrate's chambers, Agent Riolo executed the warrant and informed Agent Kahler that the bags contained approximately 70 kilograms of cocaine. Pet. App. 4a, 6a-8a, 26a-27a.

Based partly on the fact that cocaine was found in the hotel room, officers subsequently obtained and executed a search warrant for the address in Cleveland to which petitioners' vehicle was registered. There, officers found two guns, a Rolex watch worth $17,000, and $68,000 in cash. Pet. App. 8a, 27a-28a.

2. On March 18, 2003, a federal grand jury in the Northern District of Ohio returned an indictment charging petitioners with one count each of possession of cocaine with intent to distribute. Petitioners moved to suppress the cocaine seized from the hotel room; petitioner Jenkins also moved to suppress the items seized from the house in Cleveland.

The district court granted both motions. Pet. App. 20a-39a. The court noted that the search of the bags could not be justified by Bell's consent because Bell lacked actual or apparent authority either for the hotel room or for the bags. *Id.* at 30a-32a. The court then determined that, even "assumin[g] that the destruction of evidence and officer safety concerns justified a warrantless entry to secure the room," *id.* at 34a, the search of the bags was invalid. The court reasoned that the initial act of moving one of the bags to the bed, and Agent Riolo's subsequent act of squeezing the bags, constituted "searches" that were not justified by exigent circumstances. *Id.* at 35a-36a. The court concluded that "[t]he subsequent search warrant obtained for [the hotel

room] does not remove the taint of these illegal searches." *Id.* at 36a. The court rejected the government's reliance on the "independent source" doctrine—under which evidence is admissible if it is discovered through sources independent of any constitutional violation—on the ground that the warrant was not "wholly independent" of the illegal searches. *Ibid.* The court explained that "[t]he fruits of the illegal searches * * * were one of the pieces of information made available to [the magistrate] before he issued the warrant." *Id.* at 37a. The court also concluded that, because the search warrant for the house in Cleveland was based partly on the cocaine that was found in the hotel room (and because there was not probable cause absent reference to the cocaine), the warrant was defective, and the items seized during the search of the house were also inadmissible. *Id.* at 37a-39a.

3. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-19a. On appeal, the government conceded that Agent Riolo's squeezing of the bags constituted an unlawful search, but renewed its contention that the cocaine was nevertheless admissible under the "independent source" doctrine. *Id.* at 9a, 10a n.8. The court of appeals noted that, under this Court's decision in *Murray* v. *United States*, 487 U.S. 533 (1988), the critical inquiry was whether the information obtained during the earlier, unlawful search was presented to the magistrate and affected his decision to issue the warrant. Pet. App. 10a. The court added, however, that courts of appeals applying *Murray* had uniformly required that the tainted information "must affect the [magistrate's] decision in a *substantive*, meaningful way." *Id.* at 11a. Under that standard, the court reasoned, the "independent source" doctrine precluded

suppression if the warrant application, absent the tainted information, still supported a determination of probable cause, unless the tainted information prompted the officers to seek the warrant in the first place. *Ibid.*

The court of appeals stated that such an approach was "consistent with the rationale underlying *Murray*." Pet. App. 12a. "The idea behind *Murray*," the court explained, "is that police who carry out a search that they should not have carried out should be put in the same, *but no worse*, position than they would have been absent any error or misconduct." *Ibid.* The court reasoned that, when evidence is suppressed on the ground that "the magistrate was affected in some minor way by tainted information," notwithstanding the fact that the warrant would have been issued even without that information, officers would be put in a worse position than they would have been if the tainted information had not been presented. *Ibid.*

Applying that approach, the court of appeals decided that the written affidavit supported a determination of probable cause even without the orally conveyed information that the bags contained brick-shaped objects. Pet. App. 15a-16a. Citing circuit precedent for the proposition that probable cause exists if there is a "fair probability" that evidence will be found at the premises to be searched, the court determined that "the affidavit for [the hotel room] contains a particularized account of facts and circumstances that amount to a 'fair probability' that evidence could be found in the room." *Id.* at 16a. Specifically, the court cited "the payment of cash, the suspicious driving pattern of the Suburban, the criminal history of the renter of the room and the owner of the Suburban, the police canine's positive indication for narcotics in the Suburban, and the marijuana found

on [petitioner] Jenkins." *Ibid.* "Taken by itself," the court concluded, "the affidavit provides sufficient probable cause for the warrant." *Ibid.*

Finally, because it had determined that the cocaine was admissible, the court of appeals reasoned that there was no need to strike the reference to the cocaine for purposes of assessing the validity of the subsequent search warrant for the house in Cleveland, and thus concluded that the fruits of that search were also admissible. Pet. App. 17a-18a.

ARGUMENT

Petitioner Thompson claims (04-1445 Pet. 2-12) that the court of appeals erred by holding that the cocaine seized pursuant to the search warrant was admissible under the "independent source" doctrine. Petitioner Jenkins claims (04-9907 Pet. 10-13) that the officers' initial entry into the hotel room was unlawful. Further review of those claims is unwarranted.

1. As an initial matter, petitioners' claims are not ripe for review. Petitioners have not yet been tried or convicted on criminal charges to which the challenged evidence is relevant. Rather, after the court of appeals' decision on the government's interlocutory appeal in this case was issued (but before the petitions for a writ of certiorari were filed), a federal grand jury in the Northern District of Ohio returned a new indictment charging numerous defendants, including petitioners, with participation in a broader drug conspiracy. And after the petitions were filed, the district court dismissed the underlying indictment in this case. Petitioners have not yet been tried on the charges brought in the new indictment.

The dismissal of the original indictment against petitioners does not moot the issue whether the evidence challenged in this case is admissible, because the government intends to introduce the same evidence during petitioners' trial on the charges brought in the new indictment. But review is still not appropriate now. If petitioners are acquitted at trial on the new indictment, the claims that petitioners raise in the instant petitions will be moot. In contrast, if petitioners are convicted and preserve the instant claims, they will be able to raise those claims—together with any other claims they might have—in petitions for a writ of certiorari seeking review of the final judgment against them. Accordingly, this Court's review is not necessary at this time.

2. Petitioner Thompson does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decision in *Murray* v. *United States*, 487 U.S. 533 (1988). That contention lacks merit.

a. In *Murray*, the Court held that the "independent source" doctrine provides an exception to the exclusionary rule when evidence is seized pursuant to a search warrant based on lawfully obtained information, even though that evidence had previously been discovered during an illegal search. 487 U.S. at 536-541. The Court explained that the "independent source" doctrine is premised on the notion that, where there is an independent source for challenged evidence, the police should be placed in no worse a position than if the unlawful conduct had not occurred. *Id.* at 537. In applying the "independent source" doctrine to the facts at hand, the Court stated that "[t]he ultimate question * * * is whether the search pursuant to warrant was in fact a

genuinely independent source of the information and tangible evidence at issue here." *Id.* at 542. "This would not have been the case," the Court continued, "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Ibid.* (footnote omitted).

b. Petitioner Thompson contends (04-1445 Pet. 6-8) that, by stating that the "independent source" doctrine is inapplicable where unlawfully obtained information "affected [the magistrate's] decision to issue the warrant," 487 U.S. at 542, *Murray* requires a reviewing court to determine whether the tainted information *subjectively* influenced the magistrate's decision. Even before *Murray*, however, it was well established that a search warrant is valid if there was probable cause for the issuance of the warrant absent any improper information included in the affidavit. In *Franks* v. *Delaware*, 438 U.S. 154 (1978), this Court held that evidence seized pursuant to a warrant based on an affidavit that contained a deliberately false statement (or a statement made with reckless disregard for the truth) was not automatically inadmissible. *Id.* at 171-172. Instead, the Court reasoned that the relevant inquiry, when a statement was deliberately false, was whether, absent that statement, "there remains sufficient content in the warrant affidavit to support a finding of probable cause." *Id.* at 172. Similarly, in *United States* v. *Karo*, 468 U.S. 705 (1984), the Court held that evidence seized pursuant to a warrant based on an affidavit containing information illegally obtained through a beeper in a private residence was admissible. *Id.* at 721. Citing *Franks*, the Court stated that the appropriate test was whether

"sufficient untainted evidence was presented in the warrant affidavit to establish probable cause." *Id.* at 719.

Nothing in *Murray* suggests that the Court was retreating from the rule applied in *Franks* and *Karo*. Indeed, in *Murray*, the Court ultimately remanded not on the ground that unlawfully obtained information affected the magistrate's decision to issue the warrant (because the officers did not include any such information in their affidavit in the first place, see 487 U.S. at 543), but rather on the discrete ground that it was unclear whether the officers would have *sought* a warrant if they had not engaged in the earlier unlawful search, see *ibid.* And, to the extent that petitioner Thompson's reading of *Murray* would allow for suppression in at least some instances in which probable cause otherwise existed to support the search warrant, such a reading would contravene the purpose of the "independent source" doctrine, as stated in *Murray* itself: namely, to ensure that the police are placed in no worse a position than if the unlawful conduct had not occurred. *Id.* at 537. *Murray* therefore does not stand for the proposition that, in applying the "independent source" doctrine, a reviewing court must determine whether tainted information subjectively influenced the magistrate's decision.

As the court below noted (Pet. App. 11a-12a), courts of appeals applying the "independent source" doctrine have specifically rejected the reading of *Murray* advanced here by petitioner Thompson. Instead, those courts have consistently held that, in deciding whether unlawfully obtained information "affected" a magistrate's decision to issue a warrant for purposes of *Murray*, a reviewing court should determine whether there was probable cause for the issuance of the warrant in the absence of the unlawfully obtained information.

See, *e.g.*, *United States* v. *Walton*, 56 F.3d 551, 553-554 (4th Cir. 1995); *United States* v. *Ford*, 22 F.3d 374, 378-380 (1st Cir.), cert. denied, 513 U.S. 900 (1994); *United States* v. *Markling*, 7 F.3d 1309, 1314-1317 (7th Cir. 1993); *United States* v. *Restrepo*, 966 F.2d 964, 968-971 (5th Cir. 1992), cert. denied, 506 U.S. 1049 (1993); *United States* v. *Herrold*, 962 F.2d 1131, 1139-1144 (3d Cir.), cert. denied, 506 U.S. 958 (1992); cf. 6 Wayne R. LaFave, *Search and Seizure* § 11.4(f) at 328 n.301 (4th ed. 2004) (citing similar cases from highest state courts). Because Thompson does not point to any circuit conflict on the appropriate reading of *Murray*, and because Thompson's reading of *Murray* is incorrect in any event, further review on that issue is unwarranted.

c. Petitioner Thompson contends that the court of appeals erred in two additional respects. Both contentions lack merit.

Petitioner Thompson suggests (04-1445 Pet. 9-12) that, even if the court of appeals articulated the correct standard for determining whether the "independent source" doctrine was applicable, it erred by proceeding to make that determination itself, rather than remanding for the district court to do so. As discussed above, however, the court of appeals held that the appropriate inquiry under the "independent source" doctrine was whether there was probable cause for the issuance of the warrant in the absence of the unlawfully obtained information. Where, as here, there is no dispute concerning any historical facts, whether probable cause exists is subject to *de novo* appellate determination, see *Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996), and it was therefore appropriate for the court of appeals to resolve that question itself. Other courts of appeals applying *Murray* have similarly decided the existence of probable

cause on their own. See, *e.g.*, *Restrepo*, 966 F.2d at 971 (noting that, "[w]hen, as here, the determinative facts are not in dispute, the question of probable cause is one of law and may be resolved by this court"). Although the court of appeals retained the discretion to remand to the district court to determine the existence of probable cause, it did not err by opting to make that determination itself.

In the alternative, petitioner Thompson asserts (04-1445 Pet. 7-8) that the court of appeals erred by concluding that probable cause existed for the issuance of the warrant even in the absence of the unlawfully obtained information. That fact-bound contention does not warrant further review, and is in any event incorrect. As the court of appeals noted (Pet. App. 16a), the written affidavit supporting the warrant application stated, *inter alia*, that petitioners had paid for the hotel room in cash; that Thompson had been arrested for drug-related offenses, and that petitioners' vehicle was registered to a person who had been convicted of similar offenses; that petitioner Jenkins had driven the Suburban in a suspicious manner before returning to the hotel; that the police drug-detection dog had alerted to the presence of narcotics in the Suburban; and that marijuana had been found on Jenkins when he had been arrested. Those facts provided ample probable cause to believe that contraband would be found in petitioners' hotel room. The court of appeals therefore correctly held that the "independent source" doctrine was applicable, and that the cocaine seized during the search was not subject to suppression.[2]

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[2] Petitioner Thompson does not expressly contend that the "independent source" doctrine was inapplicable on the other ground

3. Petitioner Jenkins contends (04-9907 Pet. 10-13) that the officers' initial entry into the hotel room was invalid, apparently on the ground that the entry was not justified by exigent circumstances. The district court, however, assumed that "the destruction of evidence and officer safety concerns justified a warrantless entry to secure the room," Pet. App. 34a, and Jenkins did not affirmatively contend before the court of appeals that the officers' initial entry was invalid. Because Jenkins's claim was neither pressed nor passed upon below, this Court should not consider it. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *FW PBS Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, Jenkins's claim is of no relevance to the correct disposition of this case. In the court of appeals, the government conceded that Agent Riolo's squeezing of the bags constituted an unlawful search, see Pet. App. 10a n.8, and the court of appeals operated on that assumption in applying the "independent source" doctrine, see *id.* at 10a. Even if the officers' initial *entry* into the hotel room were invalid, that would at most provide an additional justification for the conclusion (consistent with the court of appeals' assumption) that the subsequent search of the bags was unlawful. Because no other information obtained after the officers' initial entry was submitted with the application for the warrant

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articulated in *Murray*: namely, that "the agents' decision to seek the warrant was prompted by what they had seen" during their unlawful conduct. 487 U.S. at 542. Any such contention in this case would lack merit, because Agent Kahler had begun preparing the application for a search warrant even before the officers entered the hotel room. See, *e.g.*, Pet. App. 4a (noting that Agent Kahler had been preparing the affidavit "[t]hroughout the morning").

to search the hotel room, the fact that the officers' initial entry was unlawful would not affect the analysis under the "independent source" doctrine.[3] Jenkins's petition therefore presents no claim that warrants further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Moreover, it does not appear that any other information obtained after the officers' initial entry was submitted with the application for the subsequent warrant to search the house in Cleveland. See Pet. App. 38a.